



House of Lords
House of Commons
Joint Committee on
Human Rights

**Counter–Terrorism Policy
and Human Rights (Ninth
Report): Annual
Renewal of Control
Orders Legislation 2008**

Tenth Report of Session 2007-08



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*Report, together with formal minutes and
appendices*

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Joint Committee on Human Rights

The Joint Committee on Human Rights is appointed by the House of Lords and the House of Commons to consider matters relating to human rights in the United Kingdom (but excluding consideration of individual cases); proposals for remedial orders, draft remedial orders and remedial orders.

The Joint Committee has a maximum of six Members appointed by each House, of whom the quorum for any formal proceedings is two from each House.

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The current staff of the Committee are: Mark Egan (Commons Clerk), Bill Sinton (Lords Clerk), Murray Hunt (Legal Adviser), Angela Patrick and Joanne Sawyer (Committee Specialists), Jackie Recardo (Committee Assistant), Karen Barrett (Committee Secretary) and Jacqueline Baker (Senior Office Clerk).

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Summary

On 30 January 2008, the Home Secretary laid before both Houses a draft Order to renew the control order legislation, the third annual extension of the control order regime. The Government takes the view that the recent House of Lords judgments on control orders upheld the control orders regime and that no amendments to the legal framework are necessary following those judgments. The Committee disagrees and considers it imperative for the Government to amend counter-terrorism laws where experience has shown them to lead to breaches of human rights. In the Committee's view control orders will continue to cause breaches of rights unless the legislation is modified in a number of important respects. It will put forward amendments intended to make the control orders regime compatible with human rights in its report on the Counter-Terrorism Bill (paragraphs 1-18).

In the Committee's view, the failure to ensure the timely availability of Lord Carlile's annual report frustrates effective parliamentary review of the operation of the control order legislation. It recommends measures to strengthen parliamentary oversight in future (paragraphs 19-34).

The Committee has previously been concerned that the control orders regime was being operated in practice in breach of the right to liberty, because the restrictions imposed were so extensive in many cases that they amounted to a deprivation of liberty. The Committee still has these concerns following the Home Secretary's response to the Lords ruling in the *JJ* case. It recommends that Parliament should amend the control orders framework to clarify what measures may amount to a deprivation of liberty and to impose a maximum limit of 12 hours a day on the length of curfews (paragraphs 35-49).

The Committee remains concerned about due process in the control orders regime. It is surprised that the statutory reviewer finds that the system of special advocates is working well, when a number of special advocates have expressed serious concern about the fairness of the procedure. It considers that the legal framework requires clarification in light of the House of Lords judgment in *MB* and recommends changes to help ensure fairer hearings in control order cases (paragraphs 50-59).

The Committee continues to support the policy professed by the Government of preferring to prosecute as a first resort. However, the fact that no individual who has been made the subject of a control order has subsequently been prosecuted for a terrorism offence calls into question the extent to which priority is given to criminal prosecution in practice. After the House of Lords judgment in the case of *E*, the Committee considers that changes to the control orders legislation are necessary to ensure that prosecution is treated as a priority and recommends amendments, including a new requirement that, except in urgent cases, the Secretary of State may only make a control order where she is satisfied that there is no reasonable prospect of a successful prosecution for a terrorism-related offence (paragraphs 60-76).

The Committee agrees with Lord Carlile that control orders cannot be continued indefinitely and that there must be an exit strategy for ending control orders in relation to each controlled person. It considers that amendments to the control orders legislation are necessary to achieve this and recommends that the law be amended to impose a duty on the Secretary of State to keep the need for a control order under review and to impose a

maximum limit on the duration of a control order (paragraphs 77-87).

As explained in previous Reports, the Committee remains very seriously concerned about the adequacy of the parliamentary scrutiny of the control orders regime and about the human rights compatibility of that regime and its operation in practice. It therefore has very serious reservations about renewal unless the Government agrees to make the necessary amendments to render it human rights compatible. Without those amendments control orders will inevitably lead to further breaches of human rights (paragraphs 88-89).

1 Introduction

Background

1. On 30 January 2008 the Home Secretary laid before both Houses the draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008,¹ along with an Explanatory Memorandum (“EM”).
2. The draft Order provides for the continuation of the control order regime contained in sections 1 to 9 of the Prevention of Terrorism Act 2005 (“the PTA 2005”) for another year from 11 March 2008 (when those provisions would otherwise expire) until the end of 10 March 2009.
3. The EM explains that the powers are “needed to ensure that a control order can continue to be made against any individual where the Secretary of State has reasonable grounds for suspecting that individual is or has been involved in terrorism-related activity and it is necessary to impose obligations on that individual for purposes connected with protecting members of the public from a risk of terrorism.”²
4. The Home Secretary has made a statement of human rights compatibility in respect of the draft Order: “In my view the provisions of the Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order are compatible with the Convention rights.”³
5. The draft Order is scheduled to be debated in the House of Commons on 21 February 2008 and in the House of Lords on 27 February 2008.
6. This is the third renewal order extending the life of the control order regime.⁴ We reported on both of the previous annual renewals.⁵

The House of Lords judgments on control orders

7. Since the last renewal the House of Lords has given judgment in three important cases concerning significant aspects of the control orders regime.⁶ The case of *JJ* concerned the point at which the obligations in a control order become so restrictive that they amount to

¹ Under s. 13(2)(c) of the Prevention of Terrorism Act 2005 which empowers the Secretary of State, by order made by statutory instrument, to provide that sections 1 to 9 of that Act are not to expire but are to continue in force for a period up to a year.

² EM para. 2.1.

³ EM para. 6.1.

⁴ The PTA 2005 received Royal Assent on 11 March 2005 and was renewed for the period 11 March 2006 to 10 March 2007 by the Prevention of Terrorism Act 2005 (Continuance in Force of sections 1 to 9) Order 2006 (SI 2006 No. 512) and for the period 11 March 2007 to 10 March 2008 by the Prevention of Terrorism Act 2005 (Continuance in Force of sections 1 to 9) Order 2007 (SI 2007 No. 706).

⁵ Twelfth Report of Session 2005-06, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2006*, HL Paper 122, HC 915 (hereafter “JCHR’s First Report on Control Order Renewal”); Eighth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2007*, HL Paper 60, HC 365 (hereafter “JCHR’s Second Report on Control Order Renewal”).

⁶ *Secretary of State for the Home Department v JJ* [2007] UKHL 45; *Secretary of State for the Home Department v MB* [2007] UKHL 46; *Secretary of State for the Home Department v E* [2007] UKHL 47 (31 October 2007).

a deprivation of liberty.⁷ The case of *MB* concerned whether the procedures in control order cases are compatible with the right of the controlled person to due process.⁸ The case of *E* concerned the extent of the duties in the PTA about keeping the possibility of criminal prosecution under review.⁹

8. In its July 2007 Consultation Paper, *Possible Measures for Inclusion in a Future Counter-Terrorism Bill*, the Government said that it would consider “whether any further changes to the control order system are necessary in light of the forthcoming House of Lords judgment in relation to control order issues.”¹⁰ The Government said that it did not want to propose any amendments at that stage that might pre-empt that judgment.

9. The Counter-Terrorism Bill,¹¹ which was published on 24 January 2008 but still awaits its Second Reading, contains some detailed amendments to the control order regime but none of them deal with any of the issues addressed by the House of Lords in its recent judgments.

10. In the Home Office’s press release accompanying the publication of Lord Carlile’s third annual report on control orders, the Home Secretary said

“The Prevention of Terrorism Act 2005 strikes the right balance between safeguarding society and safeguarding the rights of the individual. Last October’s House of Lords judgments on control orders upheld the control orders regime. As such, Parliament should recognise the importance of control orders and support the legislation’s renewal for a further year.”¹²

11. It appears that the Government has taken the view that no amendments to the control orders legislation are necessary following the judgments of the House of Lords. We disagree. In our view a number of amendments to the statutory framework are desirable in the wake of those judgments in order to make it less likely that the control order regime will be operated in practice in a way which is incompatible with human rights. We also believe that a number of other amendments, although not required by the House of Lords judgments, would make the control order regime more human rights compatible.

Our report

12. In this report we indicate in general terms what those amendments are. We will make more specific suggestions about how the legislation should be amended to give effect to those recommendations in our next Report on the Counter-Terrorism Bill which we hope to publish before the Bill reaches its Report stage in the Commons.

⁷ See chapter 3 below.

⁸ See Ninth Report of Session 2007-08, *Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill*, HL Paper 50, HC 199 (hereafter “JCHR Report on Counter-Terrorism Bill”), paras 41-73 and chapter 4 below.

⁹ See chapter 5 below.

¹⁰ Para. 58.

¹¹ HC Bill 63.

¹² Home Office press release, 18 February 2008, *Lord Carlile Report: Control Orders are “Justifiable and Proportional”*.

13. We approach the question of the renewal of control orders in full agreement with the Government about the importance of the positive obligation imposed on the Government by human rights law, to take effective steps to protect the public from the real threat of terrorism. We also agree that it is essential to keep our counter-terrorism legislation under constant review, for two reasons: first, to ensure that the authorities are properly equipped to respond effectively to the current threat and so protect the public; and, second, in the light of experience, to ensure that the counter-terrorism measures which are in place are not themselves incompatible with human rights, or used in practice in a way which breaches human rights. Counter-terrorism measures which breach human rights are ultimately counter-productive and therefore worse than ineffective in countering terrorism: they risk exacerbating the problem. In our view it is therefore imperative that the Government's recent review of counter-terrorism law leads not only to proposals to take new powers where they are shown to be necessary in order to protect the public from terrorism, but also to amendments to existing counter-terrorism laws where experience has shown them to lead to breaches of human rights.

14. As we recently indicated in our Report on the main human rights issues raised by the Counter-Terrorism Bill, we are disappointed that the Bill does not contain any measures to rectify some of the most significant human rights concerns about the operation of the control orders regime which have been identified in the course of the many legal challenges both to the regime itself and to particular orders made under it.¹³ In our previous reports on control orders, we have consistently raised a number of human rights concerns about the control orders legislation, in particular:

- The lack of opportunity for proper parliamentary scrutiny of the operation of control orders in practice¹⁴
- The severe extent of the obligations imposed by control orders which have appeared to us to be so restrictive as to amount to a deprivation of liberty, in breach of Article 5 ECHR¹⁵
- The deficiencies in the adequacy and practical effectiveness of the due process safeguards in the control orders regime, and in particular the lack of opportunity to challenge closed material, fail to secure the “substantial measure of procedural justice” required by Article 6 ECHR and the common law right to a fair hearing¹⁶
- The seriousness of the Government's commitment to prosecution as its first preference before resorting to control orders, in light of the lack of continuing investigation of controlled individuals with a view to prosecution, and the lack of effective systems to keep the prospects of prosecution under review.¹⁷

¹³ JCHR Report on Counter-Terrorism Bill, above, at para. 40.

¹⁴ JCHR's First Report on Control Order Renewal, paras 5-14; JCHR's Second Report on Control Order Renewal, paras 12-17.

¹⁵ JCHR's First Report on Control Order Renewal, paras 36-42; JCHR's Second Report on Control Order Renewal, paras 21-29.

¹⁶ JCHR's First Report on Control Order Renewal, paras 69-76; JCHR's Second Report on Control Order Renewal, paras 30-38.

¹⁷ JCHR's Second Report on Control Order Renewal, paras 39-62.

15. In our view, many of the concerns that we have previously expressed have been brought into sharper focus by recent court decisions. This report builds on our earlier reports on control orders, in particular in light of the recent House of Lords judgments. In those earlier reports, we have consistently maintained that a regime of less restrictive civil restriction orders with proper due process guarantees would be capable, in principle, of being compatible with both the right to liberty and the right to due process. However, we have very serious reservations about the renewal of the control order regime unless the Government is prepared to render the regime so compatible, by making the amendments we identify in this Report. **Unless those modifications of the control order regime are made, in our view the use of control orders will continue to give rise to breaches of individuals' rights both to liberty and due process.**

Lord Carlile's Report

16. The annual report of the statutory reviewer of the PTA 2005, Lord Carlile of Berriew QC, was published on Monday 18 February 2008, three days before the renewal order is due to be debated in the House of Commons.¹⁸ We comment below on the limited opportunity this provides for parliamentary scrutiny. Lord Carlile's principal conclusions are identical to those in his Second Report on Control Orders last year. He considers that control orders remain a necessity for a small number of cases, in the absence of a viable alternative for those few instances.¹⁹ Having seen the information, including the intelligence, on which each control order is based, he would have reached the same decision as the Home Secretary in each case in which a control order has been made.²⁰ He remains of the view that "as a last resort (only), the control order system as operated currently in its non-derogating form is a justifiable and proportional safety valve for the proper protection of civil society."²¹

17. The Report was welcomed by the Home Secretary, who cited the above conclusions and urged Parliament to renew the legislation in light of them.²²

18. In one significant respect, however, Lord Carlile's report differs from his previous reports on control orders: he has now reached the view that only in rare cases can control orders be justified for more than two years, and he recommends that there should be a presumption against extension of a control order beyond two years, save in genuinely exceptional circumstances.²³ This is significant because seven of the 15 individuals who are currently the subject of control orders have been so for more than two years, and of those seven, two have been on control orders for three years and, presumably, before that were detained for more than three years in Belmarsh under the Anti-Terrorism, Crime and Security Act 2001. We comment on this in more detail in chapter 6 of this Report.

¹⁸ *Third Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (18 February 2008) (hereafter "Lord Carlile's Third Report on Control Orders").

¹⁹ *Ibid.* at para. 27.

²⁰ *Ibid.* at para. 39.

²¹ *Ibid.* at para. 76.

²² Home Office press release, 18 February 2008 (above).

²³ Lord Carlile's Third Report on Control Orders, above, at paras 50-51.

2 Parliamentary scrutiny of control orders

Background

19. In our two previous reports on the annual renewal of the control orders legislation, in both 2006 and 2007, we were extremely critical of the lack of opportunity for meaningful parliamentary scrutiny of the operation of control orders before Parliament was asked to renew the legislation.²⁴

20. We pointed out that laying Lord Carlile's report before Parliament a matter of days before the renewal debate did not provide an opportunity for proper parliamentary scrutiny.²⁵ Our concerns were echoed in the Lords debate on the renewal order.

21. This year, notwithstanding our critical comments in our last report on renewal, the Government has followed exactly the same practice as last year. The annual report of the statutory reviewer of the operation of the control orders regime, Lord Carlile, was not laid with the draft renewal Order. The EM simply stated that "Lord Carlile's annual report on the operation of the Act is expected to be published in February 2008."²⁶

22. This was the subject of adverse comment by the Merits of Statutory Instruments Committee of the House of Lords.²⁷ Noting that Lord Carlile's annual report, which will give details of how the control order system is operating, was not laid together with the Order, the Merits Committee commented:

"We regard it as poor practice that it was not available at the same time as the Order was laid and **we trust that the report will be made available to the House in good time for the debate.**"²⁸

23. As we have pointed out above, Lord Carlile's Report was eventually published on 18 February 2008, three days before the renewal debate in the House of Commons.²⁹

24. We would go further than the House of Lords Merits Committee and suggest that by failing to ensure that Lord Carlile's report is available to Parliament sufficiently in advance of the renewal debate to permit proper scrutiny by parliamentary committees, the Secretary of State is frustrating the purpose of the important provisions for parliamentary review of the control order powers in s. 14 PTA 2005.

25. In the Government's response to our Report on last year's control orders renewal, it said "The Government published Lord Carlile's report as soon as was practicable, which

²⁴ JCHR's First Report on Control Order Renewal, paras 13-14; JCHR's Second Report on Control Order Renewal, paras 12-17.

²⁵ JCHR's Second Report on Control Order Renewal, at para. 17.

²⁶ EM para. 7.11.

²⁷ House of Lords Merits of Statutory Instruments Committee, 9th Report of Session 2007-08, drawing special attention to: Draft Prevention of Terrorism Act 2005 (Continuance in force of sections 1 to 9) Order 2008, HL Paper 51.

²⁸ *Ibid* at para. 4.

²⁹ Lord Carlile's Third Report on Control Orders, above n. 18.

this year was the first Monday after the February recess.”³⁰ Last year Lord Carlile’s report was dated “January 2007” but was published by the Secretary of State on 19 February 2007, three days before the renewal debate in the House of Commons, and accompanied by a press release by the Home Secretary containing his interpretation of the report, which he had had the benefit of seeing before Parliament. **In our view, this apparent delay in making the statutory reviewer’s report available to Parliament last year was not only poor practice, it was incompatible with the statutory requirements in s. 14 PTA 2005.**

26. Under s. 14 of the PTA 2005 Lord Carlile is required to carry out his annual review of the operation of the control order provisions “as soon as reasonably practicable in the last quarter of the year of the Act’s operation”, which means as soon as reasonably practicable after 10 December 2007. He is also required to send his report to the Home Secretary “as soon as reasonably practicable” after it is completed. The Secretary of State must lay a copy of it before Parliament, not “as soon as reasonably practicable” after receiving it, but “on receiving it”.³¹

27. This year it appears that Lord Carlile’s report was laid before Parliament by the Home Secretary at the earliest opportunity: it was received by the Home Office during the parliamentary recess and published on the first sitting day afterwards.³² In our view, however, the purpose of these important provisions for parliamentary review of the control orders regime in s. 14 PTA 2005 is to provide Parliament with the opportunity to consider carefully the report of the statutory reviewer on the operation in practice of the control order regime to ensure that the parliamentary debate on renewal is properly informed. Proper parliamentary scrutiny should include a reasonable opportunity for the relevant parliamentary committees to consider and if necessary report to Parliament in light of the statutory reviewer’s report. **The Home Secretary and the statutory reviewer should therefore ensure that the latter’s report is available to Parliament in sufficient time to allow such scrutiny before the parliamentary debate on renewal.**

28. Our experience of the unsatisfactory operation of the statutory scheme for parliamentary review of control orders led us to recommend, in the separate context of pre-charge detention, that the statutory reviewer of terrorism legislation should report at least a month before any renewal debate in order to give an opportunity for proper parliamentary scrutiny and so make parliamentary review a more meaningful safeguard.³³

29. In its response to that report, however, the Government did not respond to this recommendation.³⁴ Nor is it reflected in the relevant provisions of the recently introduced Counter-Terrorism Bill concerning parliamentary review of the Secretary of State’s power to extend the maximum period of pre-charge detention, which are closely modelled on the very provisions in the PTA 2005 which have now failed to ensure proper parliamentary

³⁰ The Government’s response was contained in a letter and memorandum dated 1 May 2007 from the Home Secretary’s predecessor, the Rt Hon John Reid MP: see Appendix to JCHR Fourteenth Report of Session 2006-07, *Government Response to the Committee’s Eighth Report of this Session*, HL Paper 106/HC539.

³¹ Section 14(6) PTA 2005.

³² Letter dated 18 February 2008 from Home Secretary to Andrew Dismore, below.

³³ Nineteenth Report of Session 2006-07, *Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL Paper 157/HC 394 (hereafter “JCHR Report on 28 days, intercept and post-charge questioning”), at para. 63.

³⁴ Cm 7215 (September 2007).

scrutiny in three consecutive years.³⁵ **We find this failure to respond to our constructive proposals for improved parliamentary review extremely disappointing, especially in light of the renewed commitment of the Prime Minister to the importance of parliamentary oversight in relation to the unusual powers required to counter terrorism.**³⁶

30. We have of course considered carefully the Home Secretary's three quarterly reports to Parliament on the control orders regime since the last renewal,³⁷ but these do not rise much above the level of bare statistics and we therefore do not find them particularly informative. In the absence of the statutory reviewer's report, our Chair wrote to the Home Secretary on 7 February 2008 asking a number of detailed questions about the operation in practice of the control orders regime, in an attempt to ensure that we were as informed as we could be, in the circumstances, to report to Parliament before the debate about renewal in the House of Commons.³⁸ In view of the imminence of the renewal debate, we asked for a response by 15 February, to give us time to consider the response and still report in time.

31. We received a response to our questions on 18 February, the same day on which Lord Carlile's Third Annual Report was published.³⁹ In this report we have sought to take both into account in so far as possible in the very short time available.

Amendments to the control orders framework

32. In view of the Government's repetition of last year's practice of making the statutory reviewer's report available to Parliament only days before the renewal debate, despite our criticism of this practice in the previous two years, and its failure to respond to our recommendation that the independent reviewer should report at least a month before any renewal debate in the context of pre-charge detention, we are driven to conclude that the provisions of the PTA 2005 concerning parliamentary review of control orders require strengthening in order to ensure that in future there is a proper opportunity for fully informed parliamentary review of the operation of the control orders regime.

33. We recommend that parliamentary oversight of the highly unusual and intrusive powers contained in the control orders regime should be strengthened by:

- i) prescribing in more detail the information to be provided by the Secretary of State in her quarterly reports to Parliament about her exercise of the control orders power;⁴⁰**
- ii) requiring the Home Secretary to provide to Parliament, at least a month before the annual renewal debate, an annual report on the exercise of the control order powers since the last renewal;**

³⁵ Counter Terrorism Bill, HC Bill 63, Schedule 1, para. 46.

³⁶ See e.g. the Prime Minister's oral statement to the House of Commons on national security, HC Deb 25 July 2007 cols 841-845; *The Governance of Britain* Green Paper, Cm 7170, July 2007, para. 88; *Possible Measures for Inclusion in a Future Counter-Terrorism Bill*, Home Office consultation paper, 25 July 2007, paras 7-10.

³⁷ Most recently on 12 December 2007 (HC Deb 12 December 2007 col 38WS).

³⁸ Appendix 1.

³⁹ Appendix 2.

⁴⁰ As required by s. 14(1) PTA 2005.

- iii) **providing for the statutory reviewer of the operation of the Act to be appointed by Parliament not the Secretary of State, so that he or she is seen to be entirely independent of the Secretary of State and to emphasise that the reviewer's function is to inform Parliament and to facilitate informed parliamentary debate;**
- iv) **providing for the statutory reviewer to report directly to Parliament, not to the Secretary of State (as does, for example, the Parliamentary and Health Services Ombudsman⁴¹);**
- v) **providing for the independent reviewer to report to Parliament on the operation in practice of the control orders regime and of the necessity for it, at least a month before the annual renewal debate.**

34. We will be suggesting specific amendments to the PTA to ensure that these recommendations are debated in Parliament during the passage of the Counter-Terrorism Bill in our forthcoming report on that Bill.⁴²

⁴¹ Under s. 10(4) Parliamentary Commissioners Act 1967 and s. 14(4) Health Service Commissioners Act 1993.

⁴² We will be making similar recommendations in relation to the provisions in the Counter Terrorism Bill concerning parliamentary review of the exceptional power to detain without charge beyond 14 days prior to the annual renewal of that power.

3 Deprivation of liberty

Background

35. In our previous two Reports on the annual renewal of the control orders legislation, we expressed our concern that the control orders regime was being operated in practice in breach of the right to liberty in Article 5 ECHR, because it was being used to impose control orders so restrictive of liberty as to amount to deprivations of liberty. We were therefore concerned that many of the control orders which had so far been imposed, which included 18 hour curfews amongst a variety of other serious restrictions on the individuals' private and family life, freedom of movement and freedom of association, were in fact derogations from Article 5.⁴³ We reported our concern that in being asked to renew a power which was being exercised in this way, Parliament was being asked to authorise what are effectively derogating measures without having the opportunity to debate whether the strict pre-conditions for a derogation from the right to liberty were made out.

36. The Government, in its response to our Report on last year's renewal of the control order regime, stated that it "does not accept that any of the control orders made thus far ... deprive any individual of their liberty."⁴⁴

The House of Lords judgment in *JJ*

37. The House of Lords has now ruled on this question in the case of *JJ and others*, which concerned six control orders.⁴⁵ By a majority of three to two, the House of Lords rejected the Secretary of State's argument that the six control orders made in those cases did not deprive the individuals of their liberty.⁴⁶ They upheld the decisions of the High Court and the Court of Appeal that the effect of the restrictions, considered cumulatively, was so restrictive of the individuals' liberty as to amount to a deprivation of liberty. The control orders therefore breached Article 5 and for that reason had to be quashed.⁴⁷

38. However, one member of the majority, Lord Brown, although holding that the control orders in question (which had 18 hour curfews) amounted to deprivations of liberty, indicated that in his view curfews up to 16 hours a day would not amount to a deprivation of liberty.⁴⁸

39. On the basis of Lord Brown's indication, the Home Secretary has subsequently argued that there is a majority in the House of Lords judgment in *JJ* (taking account of the views of the two dissenting judges that control orders containing curfews of 18 hours did not amount to a deprivation of liberty) that control orders imposing curfews up to 16 hours a day, where it is necessary and proportionate to do so, are not in breach of Article 5 because

⁴³ A control order which deprives a person of their liberty is a "derogating control order" because it requires a derogation from Article 5 ECHR. Under the PTA 2005 the Secretary of State has no power to make a derogating control order, only the courts have such power: s. 4 PTA 2005.

⁴⁴ Government Response to JCHR's Second Report on Control Order Renewal, above n. 30, at p. 5.

⁴⁵ *Secretary of State for the Home Department v JJ and others* [2007] UKHL 45 (31 October 2007).

⁴⁶ Lord Bingham, Baroness Hale and Lord Brown in the majority, Lords Hoffmann and Carswell dissenting.

⁴⁷ *JJ* [2007] UKHL 45 at paras 24 (Lord Bingham), 63 (Baroness Hale) and 105 (Lord Brown).

⁴⁸ *Ibid* at paras 105 and 108.

they do not amount to deprivations of liberty. The Home Secretary has therefore increased the curfews in four cases from 12 to 16 hours (having previously reduced them from 18 to 14 and then to 12 hours in light of the earlier judgments of the lower courts).⁴⁹

40. The net effect of the lengthy litigation about the compatibility of control orders with the right to liberty in Article 5 ECHR has therefore been to reduce the curfew period in the most onerous control orders from 18 to 16 hours.

Amendments to the control orders framework

41. We find Lord Brown's indication in his judgment in *JJ* to be a very slender legal basis on which to increase the curfew periods in existing control orders from 12 to 16 hours. Taken together with the other restrictions, that extension is a significant increase in the restriction on liberty. Lord Brown himself was somewhat tentative about his interpretation of Article 5 ECHR:

“I think that nowadays a longer curfew regime than 16 hours a day (with the additional restraints imposed in these cases) would surely be classified in Strasbourg as a deprivation of liberty. It may be, indeed, that 16 hours is too long. I would, however, leave it to the Strasbourg Court to decide upon that, were any such argument to be addressed to it.”⁵⁰

42. The issue will certainly find its way to the Strasbourg Court in due course, although it may take several years to do so. In the meantime, however, in our view, it is incumbent on Parliament to reach its own view about what the right to liberty in Article 5 ECHR requires in this particular context, and to spell it out more clearly in the statutory framework governing control orders. We think there is scope to provide clearer guidance to courts about what Parliament would consider to amount to a deprivation of liberty and therefore not within the scope of the power to make a non-derogating control order.

43. We therefore recommend that the PTA 2005 be amended in the following respects, drawing on some of the clarifications provided by the courts, in order to reduce the risk of incompatibility with the right to liberty in Article 5 ECHR.

(1) Clarify the meaning of “deprivation of liberty” in Article 5 ECHR

44. To focus on the length of the curfew as the main determinant of whether a control order amounts to a deprivation of liberty, as Lord Brown did in his judgment, is in our view to misinterpret the nature of the approach taken by the European Court of Human Rights when determining whether a variety of restrictions on an individual amount to a deprivation of liberty.

45. In *Guzzardi v Italy*, for example, the curfew was only for nine hours, but the combined effect of the other restrictions imposed on the individual led the Court of Human Rights to

⁴⁹ Letter from Home Secretary dated 18 Feb 2008 (Appendix 2). A new control order containing a 16 hour curfew has also been imposed since the House of Lords judgment, bringing to 5 the total number of control orders imposing a 16 hour curfew.

⁵⁰ [2007] UKHL 45 at para. 106.

conclude that there had been a deprivation of liberty.⁵¹ As Lord Bingham said in *JJ*, because account must be taken of an individual's whole situation, it is "inappropriate to draw a sharp distinction between a period of confinement which will, and one which will not, amount to a deprivation of liberty, important though the period of daily confinement will be in any overall assessment."⁵²

46. We therefore recommend that the PTA be amended to clarify the approach to be taken by courts to the question whether the effect of a control order is to deprive a person of their liberty. This could simply take the form, for example, of spelling out expressly in the statute that the courts must have regard to factors such as the nature, duration, effects and manner of implementation of the restrictions, and that the combination of obligations may amount to a deprivation of liberty even if no individual obligation amounts to such a deprivation. We will suggest amendments to give effect to this recommendation in our report on the Counter-Terrorism Bill.

(2) Impose maximum limit on daily length of curfews

47. We also recommend that Parliament should amend the PTA to impose a maximum daily limit on the curfew which can be imposed in a control order in order to make it less likely that control orders will be found to be in breach of Article 5.

48. There is clearly scope for argument and disagreement about what that limit should be, but in our view, **given the seriousness of the other restrictions imposed on individuals in the most onerous control orders, and their open-ended nature, it should be 12 hours, not 16 hours as the Government currently interprets its obligations under Article 5 ECHR.**

49. We hasten to point out that this would be a maximum limit, not a line below which curfews do not amount to a deprivation of liberty. In our view, as we have explained above and as the case of *Guzzardi* makes clear, **control orders which contain curfews of less than 12 hours are still capable of amounting to a deprivation liberty if the other restrictions imposed on the individual are sufficiently severe.**

⁵¹ (1980) 3 EHRR 333 at para. 95. The case concerned a "compulsory residence order" against a suspected Mafioso, under which he was required to live on a small island. Although he was only subjected to a 9 hour curfew, the combined effect of the other conditions left him socially isolated and led the Court to conclude, on balance, that he had been deprived of his liberty.

⁵² *JJ* [2007] UKHL 45 at para. 16 (Lord Bingham).

4 Due process

Background

50. In our reports on the two previous control orders renewal Orders, we expressed a number of due process concerns about the control orders regime which led us to doubt whether the regime as a whole was compatible with the right to a fair hearing in Article 6(1) ECHR and the equivalent common law rights.

51. Although at the time of last year's renewal the Court of Appeal had ruled that the control order regime was compatible with the right to a fair hearing,⁵³ we maintained our earlier view, doubting whether the procedures for the judicial supervision of control orders in PTA 2005 in fact secure the substantial measure of procedural justice claimed for them.⁵⁴

52. The Government in its Response to our report on last year's renewal Order said it "does not accept the view that the control order regime violates controlled individuals' right to a fair trial."⁵⁵

The House of Lords judgment in *MB*

53. The House of Lords in *MB*, however, recently held, by a majority of four to one, that the procedures contained in the PTA 2005 and the Rules of Court made under it would not be compatible with the right to a fair hearing to the extent that they could lead to the upholding of a control order where the essence of the case against the controlled person remained entirely undisclosed to him or her.⁵⁶ In their opinion, the statutory regime could only be made compatible with the right to a fair hearing by using s. 3 of the Human Rights Act to read into the legislation additional words guaranteeing the right of the controlled person to a fair hearing.

54. We welcome the House of Lords' rejection of the Government's argument that the statutory regime for control orders will always provide the individuals concerned with a substantial measure of procedural justice. The House of Lords judgment accords with many of the concerns we have repeatedly expressed about the fairness of control order proceedings. We note that Lord Carlile in his Third Report on Control Orders describes the challenge to the compatibility of the control orders legislation with Article 6 ECHR in *MB* as having been "unsuccessful".⁵⁷ Although it is correct that the House of Lords decided not to give the declaration of incompatibility sought by the appellants, their due process argument succeeded to the extent that the House of Lords accepted that the legislation required additional words to be read in to ensure that the right to a fair hearing is not infringed. Lord Carlile acknowledges that there is a lack of certainty following the House of

⁵³ *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140.

⁵⁴ JCHR's Second Report on Control Orders Renewal, above n. 5, at para. 37.

⁵⁵ Government Response to JCHR's Second Report on Control Order Renewal, above n. 30, at p. 5.

⁵⁶ *Secretary of State for the Home Department v MB* [2007] UKHL 46.

⁵⁷ Lord Carlile's Third Report on Control Orders, at para. 18.

Lords judgment, but concludes that this “will ensure the most careful consideration of each case by the Home Secretary.”⁵⁸

55. We are not prepared to be so sanguine and prefer to see the statutory framework clarified by Parliament in light of the House of Lords judgment in *MB*.

56. We also note that Lord Carlile’s Report suggests that the special advocate procedure is working well,⁵⁹ and that the Rules of Court governing the conduct of control order proceedings also “continue to work reasonably well.”⁶⁰ We are surprised by this conclusion, given the serious concerns about the fairness of the special advocate procedure expressed in evidence to us by a number of special advocates,⁶¹ and the concerns of the majority of the House of Lords in *MB* about the dangers of controlees being denied the essence of a fair hearing. We are also disappointed that the statutory reviewer of the operation in practice of control orders does not appear to have taken into account our own detailed recommendations about how to improve the fairness of the special advocate regime.⁶²

Amendments to the control orders framework

57. In our recent report on the Counter-Terrorism Bill we explained why, in our view, the opportunity should be taken in that Bill to make a number of amendments to the control order regime to ensure that in future hearings are much more likely to be fair.⁶³ We recommended six amendments to the legal framework for control orders designed to have that effect:

- (1) the insertion of an express reference to the right to a fair hearing, making clear that nothing in the PTA requires a court to act incompatibly with the right of a controlled person to a fair hearing;
- (2) the addition of an obligation on the Secretary of State to give reasons for the making of a control order;
- (3) the imposition of an obligation on the Secretary of State to provide a statement of the gist of any closed material on which fairness requires the controlled person have an opportunity to comment;
- (4) provision for judicially authorised communication between the special advocate and the controlled person without having to disclose the questions to the Secretary of State;

⁵⁸ *Ibid.* at para. 61.

⁵⁹ *Ibid.*, at para. 56.

⁶⁰ *Ibid.*, at para. 90.

⁶¹ See JCHR Report on 28 days, intercept and post-charge questioning, above n. 33, paras 192-209 for a summary of the special advocates’ concerns, and Ev10-21 for the oral evidence of the special advocates.

⁶² JCHR Report on Counter-Terrorism Bill, above n. 9, at paras 55-73.

⁶³ *Ibid.*

(5) the insertion of an entitlement of the controlled person to such measure of procedural protection (including the standard of proof) as is commensurate with the gravity of the potential consequences for the controlled person; and

(6) the provision of a power for special advocates to call witnesses to rebut closed material.

58. For ease of reference we set out in an Annex the detailed explanations of those amendments taken from our recent Report on the Counter-Terrorism Bill.

59. In addition to these due process concerns, Lord Carlile has also expressed concern about the part of the statutory framework concerning appeals against control orders, which provides that the principles applicable on such appeals are those applicable on an application for judicial review.⁶⁴ **We share his concern about whether the legislation is sufficiently clear to ensure that the High Court can set aside a control order if it is based on a serious factual error or that there is new evidence to show that there has been a substantial change in the situation since the making of the order. We intend to suggest an amendment to ensure that the issue is considered by Parliament during the passage of the Counter-Terrorism Bill.**

⁶⁴ Lord Carlile's Third Report on Control Orders, paras 82-83.

5 The priority of prosecution

Background

60. The Government continues to state that prosecution is, and will remain, its preferred way of dealing with terrorists.⁶⁵ We shall refer to this as its policy of “the priority of prosecution”. The policy means that prosecution is the Government’s first priority, and control orders are only resorted to in cases where prosecution is not possible.

61. **We continue to welcome the Government’s professed policy of the priority of prosecution. We regard criminal prosecution, rather than indefinite resort to the parallel jurisdiction of control orders, as the way, compatible with human rights, to deal with these cases in the long run.** In the past, however, we have expressed serious concerns about the vigour with which the Government was pursuing prosecution as its preferred counter-terrorism measure. In our report on last year’s renewal of the control orders legislation, for example, we expressed our concern that after the making of a control order there appeared to be insufficient continuing investigation with a view to prosecution, and a lack of effective systems to keep the prospects of prosecution under review.⁶⁶

62. We welcome the fact that since last year’s renewal of the control orders regime the Government has made some progress towards facilitating prosecutions of individuals for offences relating to terrorism, for example by including provision for post-charge questioning in the Counter-Terrorism Bill⁶⁷ and by accepting the recommendation of the Chilcot Report that it should be possible to find a way to use some intercept material as evidence, provided certain key conditions can be met to safeguard national security.⁶⁸ We note, however, that the Chilcot Report states that it has seen no evidence to suggest that the need for measures such as control orders would be reduced by the introduction of intercept as evidence.⁶⁹

The House of Lords judgment in *E*

63. We also welcome the fact that the House of Lords in the recent case of *E* upheld the decisions of lower courts that it is implicit in the scheme of the PTA that it is the Secretary of State’s duty to keep the possibility of prosecution under continuing review.⁷⁰ Indeed, the Secretary of State in that case expressly accepted that “the scheme of the Act is that control orders should only be made where an individual cannot realistically be prosecuted for a terrorism-related offence.”⁷¹ We particularly welcome Baroness Hale’s articulation of the human rights justification for the policy of the priority of prosecution:

⁶⁵ See e.g. Government Response to Lord Carlile’s Second Report on Control Orders, July 2007.

⁶⁶ JCHR’s Second Report on Control Orders Renewal, above n. 5, at paras 48, 49 and 54.

⁶⁷ See JCHR Report on the Counter-Terrorism Bill, above n. 8, chapter 3.

⁶⁸ Prime Minister’s statement to the House of Commons, HC Deb 6 Feb 2008.

⁶⁹ *Privy Council Review of Intercept as Evidence*, Cm 7324 (30 January 2008).

⁷⁰ *Secretary of State for the Home Department v E* [2007] UKHL 47 e.g. at paras 18 and 26-28.

⁷¹ *Ibid.* at para. 14.

“... a control order must always be seen as ‘second best’. From the point of view of the authorities, it leaves at liberty a person whom they reasonably believe to be involved in terrorism and consider a risk for the future. The public is far better protected, even while criminal proceedings are pending, let alone if they result in a conviction. From the point of view of the controlled person, serious restrictions are imposed upon his freedom of action on the basis of mere suspicion rather than actual guilt. From both points of view, prosecution should be the preferred course.”⁷²

64. The same point is made by Lord Carlile in his Third Report on Control Orders: he welcomes what he describes as the “trend” towards the charging of more individuals with criminal conduct, saying that it is in the public interest for the conventional charge and trial process to be used whenever possible, rather than control orders.⁷³

65. **Although we welcome these developments, the fact that no individual who has been made the subject of a control order has subsequently been prosecuted for a terrorism offence, other than for breach of a control order, seems to us to be significant.**⁷⁴ We therefore continue to question the extent to which, in relation to certain individuals, priority is really given to criminal prosecution rather than the indefinite and extensive control which is currently available through the use of control orders. In our view, the Government’s professed policy of preferring to prosecute as a first resort could be more effectively underpinned by a number of amendments to the control orders framework. We summarise these below and will suggest concrete amendments to give effect to them in our forthcoming report on the Counter-Terrorism Bill.

Amendments to the control orders framework

(1) New pre-condition for making of control order

66. The House of Lords in *E* rejected the argument that the absence of a realistic prospect of prosecution is a pre-condition of the making of a non-derogating control order. The reason for rejecting it was that “there may be a need to act with great urgency. ... The condition precedent contended for would have the potential to emasculate what is clearly intended to be an effective procedure and cannot be taken to represent the intention of Parliament.”⁷⁵

67. In our view, however, it is a simple matter to amend the statute in a way which deals with the concern about urgent cases at the same time as making absolutely clear that control orders should only be made where an individual cannot realistically be prosecuted for a terrorism offence. We think it is important to do so because most control orders are made using the non-urgent procedure: in 2007 there was only one case in which the urgent procedure was used by the Secretary of State.⁷⁶ **We recommend that the PTA 2005 should be amended to provide that, except in urgent cases,⁷⁷ the Secretary of State may only**

⁷² Ibid. at para. 26.

⁷³ Lord Carlile’s Third Report on Control Orders, above n. 18, at paras 4 and 74.

⁷⁴ Confirmed by the Secretary of State in her letter dated 18 Feb 2008 (Appendix 2).

⁷⁵ *Secretary of State for the Home Department v E* [2007] UKHL 47 at para. 16 (Lord Bingham).

⁷⁶ Lord Carlile’s Third Report on Control Orders, above n. 18, at para. 94.

⁷⁷ That is, where the control order is made under s. 3(1)(b) PTA 2005.

make a control order where she is satisfied that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.

68. This would make absolutely clear that it is Parliament's intention that, except in urgent cases, control orders are only to be made when it is considered that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence.

(2) Duty on Secretary of State to keep possibility of prosecution under review and to facilitate such review

69. The Secretary of State argued in the Court of Appeal in *E* that, having consulted the chief of police at the outset, she need do no more thereafter than make periodic inquiry whether the prospect of prosecution had increased. The Court of Appeal rejected that argument and held that more was called for from the Secretary of State:⁷⁸

“Once it is accepted that there is a continuing duty to review ..., it is implicit in that duty that the Secretary of State must do what he reasonably can to ensure that the continuing review is meaningful... it was incumbent upon him too provide the police with material in his possession which was or might be relevant to any reconsideration of prosecution.”

70. The House of Lords in *E* endorsed the Court of Appeal's approach.⁷⁹

71. The Government, in its reply to Lord Carlile's Second Report, says that new procedures are now in place in relation to prosecution. At the initial stage of making the order, the police now write a much more detailed letter to the Home Office advising on the prospect of prosecution after having sought the CPS's advice. New procedures are also said to be in place to ensure that the possibility of prosecution is also considered on an ongoing basis. The police review any new material brought to their attention and, where necessary, consult the CPS and feed the outcome into the formal Control Order Review Group.

72. We welcome the improvements to the Home Office's systems for keeping the prospects of prosecution under review. In our view, however, the policy of giving priority to prosecution would be better served by turning this from a matter of mere practice into one of express statutory obligation. We recommend that the PTA 2005 be amended to impose an express duty on the Secretary of State, throughout the period during which a control order has effect, to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence is kept under review at least every 3 months.

73. We also believe it would be beneficial to impose an express duty on the Secretary of State to facilitate such a review of the prospects of prosecution. We discussed control orders at an informal meeting with Deputy Assistant Commissioner Peter Clarke and other senior police officers on 23 October 2007 and we were not left feeling confident that the police see very much of the material on the basis of which the Home Secretary imposes control orders on individuals. **We therefore recommend that the Secretary of State should be placed under a duty to consult the police prior to her regular review of the**

⁷⁸ *Secretary of State for the Home Department v E* [2007] EWCA Civ 459 at para. 97.

⁷⁹ *Secretary of State for the Home Department v E* [2007] UKHL 47 at para. 18.

prospects of prosecution and to share with the police such information (including intelligence information) as is available to her which is relevant to the prospects of a successful prosecution.

74. We will seek to propose amendments to the PTA to this effect in due course.

(3) Transparency of prosecution decisions

75. Lord Carlile in his Third Report on Control Orders observes that the quality of the letters from the police concerning possible prosecution has improved in that some reasoning is now given, but he would like to see more detail given to the Home Secretary as to why additional investigation, or different forms of evidence gathering, might not enable a criminal prosecution.⁸⁰ He believes that continuing investigation into the activities of some of the current controlees could provide evidence for criminal prosecution and conviction.

76. We recommend that the control orders legislation be amended to secure greater transparency of decisions that prosecution is not possible, first by imposing a duty on the chief officer of police to provide reasons when he advises the Secretary of State that there is no realistic prospect of prosecution and, second, by providing that those reasons shall be disclosed to the controlled person to the extent that such disclosure would not be contrary to the public interest. This would give legislative effect to a recommendation first made by Lord Carlile in his First Report on Control Orders in 2006.⁸¹

⁸⁰ Lord Carlile's Third Report on Control Orders, above n. 18, at para. 74.

⁸¹ *First Report of the Independent Reviewer pursuant to section 14(3) of the Prevention of Terrorism Act 2005* (2 February 2006) at paras 45-46.

6 Exit strategy

Background

77. In our report on last year’s annual renewal, we agreed with Lord Carlile’s important warning, in his Second Report on Control Orders, that there is an urgent need for an exit strategy, that is, a strategy for ending the control orders in relation to each controlled person, because control orders cannot be continued indefinitely.⁸² In his Third Report, Lord Carlile remains concerned about the need for an exit strategy in relation to each control order, but it is now his view that “it is only in rare cases that control orders can be justified for more than two years.”⁸³ He therefore recommends that there should be a recognised and possibly a statutory presumption against a control order being extended beyond two years except in genuinely exceptional circumstances.⁸⁴

78. In its response to Lord Carlile’s Second Report, the Government said that it had now placed on a more formal basis its consideration of exit strategies for individuals subject to control orders. Any possible exit strategy for an individual is formally considered at the quarterly review group meeting, with a view to deciding whether a control order remains necessary, whether there are other options to address the risks, and whether the control order obligations remain necessary and proportionate. The main potential exit strategies for individuals are:

- Prosecution
- Deportation (in the case of foreign nationals)
- Modification of the obligations in the control order
- Non-renewal or revocation of the control order
- De-radicalisation and rehabilitation programmes (though the identification and evaluation of such programmes is said to be at an early stage).

79. Recruitment as an informer by the Security Service would not in our view be a legitimate exit strategy as this would introduce an illegitimate purpose into the maintenance of the control order. We look forward to receiving the Home Secretary’s confirmation that individuals who are the subject of control orders have not and will not be approached by the Security Service for this purpose.

80. We welcome the Government’s formalisation of its review of possible exit strategies for individuals subject to control orders. However, we note that while the Government, in its response to Lord Carlile’s Second Report, accepted that control orders should not continue indefinitely “if at all possible”, it “does not accept that a control order should be revoked according to an arbitrary timetable.” In the Government’s view, if an individual on a

⁸² JCHR Second Report on Control Orders Renewal, above n. 5, at para. 59.

⁸³ Lord Carlile’s Third Report on Control Orders, above n. 18, at para. 50.

⁸⁴ Ibid. at para. 51.

control order who poses a risk of terrorism to the public still cannot be prosecuted or deported, it is the Government's responsibility to renew that control order.

81. In our view two amendments to the control orders legislation are necessary to give full effect to Lord Carlile's recommendation that control orders cannot be continued indefinitely and that there must be a strategy for ending the control order in relation to each controlled person.

Amendments to the control orders framework

(1) Duty to keep need for control order under review

82. The PTA 2005 does not impose any duty on the Secretary of State to keep the decision to impose a control order under review. The Court of Appeal in *MB*, however, held this to be implicit in the Act,⁸⁵ and this was upheld in the House of Lords.

83. The Secretary of State accepts that she is under a duty to keep the decision to impose a control order under review. The mechanism for ensuring compliance with this duty is the Control Order Review Group which meets every quarter, with representation from law enforcement and intelligence agencies. In her most recent quarterly report on control orders the Home Secretary states that such review groups keep the obligations in the order under review and facilitate a review of appropriate exit strategies.⁸⁶ It is not clear from this whether the regular review considers the continued necessity for the order.

84. We recommend that the control order legislation be amended to impose an express duty on the Secretary of State to keep the decision to impose a control order under review, including by considering whether there continue to be reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity and whether a control order continues to be necessary at all.

(2) Limit on maximum duration of a control order

85. We accept that the question of whether there should be a maximum limit on the duration of a control order is a difficult one. We can see the force in the Government's argument that it is under a duty to take some positive steps to protect the public if it has reason to suspect that a person poses a risk to the public from terrorism. On the other hand, severe restrictions on liberty of indefinite duration are extremely problematic in human rights terms, and involve an ever-growing risk of subjecting those who are under such controls to inhuman or degrading treatment contrary to Article 3 ECHR, or to the interferences with their Convention rights to privacy and respect for private life becoming disproportionate. Although the Home Secretary denies that individuals are indefinitely subject to control orders, the fact is that several of the controlees have already been the subject of their orders for a considerable time. According to the Home Secretary's own information, two individuals have been on control orders since they were introduced almost three years ago, and a total of seven of the current 15 on control orders have been

⁸⁵ *Secretary of State for the Home Department v MB* [2006] EWCA Civ 1140 at para. 44.

⁸⁶ HC Deb 12 December 2007 col 38WS.

on control orders for more than two years.⁸⁷ It is likely that two (we do not know precisely how many) were also detained in Belmarsh under the Anti Terrorism Crime and Security Act 2001 before that.

86. The availability of a control order for a finite period might also serve to focus the efforts of investigators to come up with material which can be used as evidence in a criminal prosecution rather than rely on the indefinite availability of a control order.

87. We do not believe it is sufficient to rely solely on the courts to ensure that the operation of an individual control order is not indefinite or so prolonged that it breaches human rights obligations. We see the force of Lord Carlile's suggestion that there could be a statutory presumption against control orders being extended beyond a maximum duration of two years other than in genuinely exceptional circumstances. On balance, we are in favour of a maximum limit on the duration of a control order, both as an important safeguard of the liberty and mental health of the individuals concerned, and as a discipline on the investigative and enforcement authorities to find material capable of being the basis for a criminal prosecution within a reasonable time. Beyond prohibiting severe controls of indefinite duration, however, human rights law does not provide any clear answer as to what that limit should be. We recommend that Parliament should debate the principle of whether there should be a maximum limit on the duration of a control order, and if so what that limit should be. We will propose an amendment to the Counter-Terrorism Bill to enable such a debate to take place.

⁸⁷ Letter of 18 February 2008 (Appendix 2).

7 Conclusion

88. We express in this Report our major concerns about the adequacy of parliamentary scrutiny of the control order regime that was both promised by the Government at the outset and that is necessary. For the reasons we have explained in this and previous Reports, we continue to have very serious concerns about the human rights compatibility of both the control orders regime itself and its operation in practice. In particular we remain concerned that the regime as it currently stands and as it is currently operated is very likely to result in breaches of both the right to liberty and the right to a fair hearing.

89. We therefore have very serious reservations about the renewal of the control order regime unless the Government is prepared to make the amendments we identify in this Report which are intended to render it human rights compatible. Unless those modifications of the control order regime are made, in our view it is inevitable that the use of control orders will continue to give rise to breaches of individuals' rights both to liberty and due process.

Conclusions and recommendations

1. It appears that the Government has taken the view that no amendments to the control orders legislation are necessary following the judgments of the House of Lords. We disagree. (Paragraph 11)
2. We approach the question of the renewal of control orders in full agreement with the Government about the importance of the positive obligation imposed on the Government by human rights law, to take effective steps to protect the public from the real threat of terrorism. We also agree that it is essential to keep our counter-terrorism legislation under constant review, for two reasons: first, to ensure that the authorities are properly equipped to respond effectively to the current threat and so protect the public; and, second, in the light of experience, to ensure that the counter-terrorism measures which are in place are not themselves incompatible with human rights, or used in practice in a way which breaches human rights. Counter-terrorism measures which breach human rights are ultimately counter-productive and therefore worse than ineffective in countering terrorism: they risk exacerbating the problem. In our view it is therefore imperative that the Government's recent review of counter-terrorism law leads not only to proposals to take new powers where they are shown to be necessary in order to protect the public from terrorism, but also to amendments to existing counter-terrorism laws where experience has shown them to lead to breaches of human rights. (Paragraph 13)
3. Unless the modifications of the control order regime we recommended in our Report on the Counter-Terrorism Bill are made, in our view the use of control orders will continue to give rise to breaches of individuals' rights both to liberty and due process. (Paragraph 15)
4. We would go further than the House of Lords Merits Committee and suggest that by failing to ensure that Lord Carlile's report is available to Parliament sufficiently in advance of the renewal debate to permit proper scrutiny by parliamentary committees, the Secretary of State is frustrating the purpose of the important provisions for parliamentary review of the control order powers in s. 14 PTA 2005. (Paragraph 24)
5. In our view, this apparent delay in making the statutory reviewer's report available to Parliament last year was not only poor practice, it was incompatible with the statutory requirements in s. 14 PTA 2005. (Paragraph 25) The Home Secretary and the statutory reviewer should therefore ensure that the latter's report is available to Parliament in sufficient time to allow such scrutiny before the parliamentary debate on renewal. (Paragraph 27)
6. We find the Government's failure to respond to our constructive proposals for improved parliamentary review extremely disappointing, especially in light of the renewed commitment of the Prime Minister to the importance of parliamentary oversight in relation to the unusual powers required to counter terrorism. (Paragraph 29)

7. We recommend that parliamentary oversight of the highly unusual and intrusive powers contained in the control orders regime should be strengthened by:
 - i) prescribing in more detail the information to be provided by the Secretary of State in her quarterly reports to Parliament about her exercise of the control orders power;
 - ii) requiring the Home Secretary to provide to Parliament, at least a month before the annual renewal debate, an annual report on the exercise of the control order powers since the last renewal;
 - iii) providing for the statutory reviewer of the operation of the Act to be appointed by Parliament not the Secretary of State, so that he or she is seen to be entirely independent of the Secretary of State and to emphasise that the reviewer's function is to inform Parliament and to facilitate informed parliamentary debate;
 - iv) providing for the statutory reviewer to report directly to Parliament, not to the Secretary of State (as does, for example, the Parliamentary and Health Services Ombudsman)
 - v) providing for the independent reviewer to report to Parliament on the operation in practice of the control orders regime and of the necessity for it, at least a month before the annual renewal debate. (Paragraph 33)

8. We recommend that the PTA be amended to clarify the approach to be taken by courts to the question whether the effect of a control order is to deprive a person of their liberty. This could simply take the form, for example, of spelling out expressly in the statute that the courts must have regard to factors such as the nature, duration, effects and manner of implementation of the restrictions, and that the combination of obligations may amount to a deprivation of liberty even if no individual obligation amounts to such a deprivation. We will suggest amendments to give effect to this recommendation in our report on the Counter-Terrorism Bill. (Paragraph 46)

9. We recommend that Parliament should amend the PTA to impose a maximum daily limit on the curfew which can be imposed in a control order in order to make it less likely that control orders will be found to be in breach of Article 5. (Paragraph 47) Given the seriousness of the other restrictions imposed on individuals in the most onerous control orders, and their open-ended nature, it should be 12 hours, not 16 hours as the Government currently interprets its obligations under Article 5 ECHR. (Paragraph 48) Control orders which contain curfews of less than 12 hours are still capable of amounting to a deprivation liberty if the other restrictions imposed on the individual are sufficiently severe. (Paragraph 49)

10. We also note that Lord Carlile's Report suggests that the special advocate procedure is working well, and that the Rules of Court governing the conduct of control order proceedings also "continue to work reasonably well." We are surprised by this conclusion, given the serious concerns about the fairness of the special advocate procedure expressed in evidence to us by a number of special advocates, and the concerns of the majority of the House of Lords in *MB* about the dangers of controllees being denied the essence of a fair hearing. We are also disappointed that

the statutory reviewer of the operation in practice of control orders does not appear to have taken into account our own detailed recommendations about how to improve the fairness of the special advocate regime. (Paragraph 56)

11. We share Lord Carlile's concern about whether the legislation is sufficiently clear to ensure that the High Court can set aside a control order if it is based on a serious factual error or that there is new evidence to show that there has been a substantial change in the situation since the making of the order. We intend to suggest an amendment to ensure that the issue is considered by Parliament during the passage of the Counter-Terrorism Bill. (Paragraph 59)
12. We continue to welcome the Government's professed policy of the priority of prosecution. We regard criminal prosecution, rather than indefinite resort to the parallel jurisdiction of control orders, as the way, compatible with human rights, to deal with these cases in the long run. (Paragraph 61)
13. The fact that no individual who has been made the subject of a control order has subsequently been prosecuted for a terrorism offence, other than for breach of a control order, seems to us to be significant. We therefore continue to question the extent to which, in relation to certain individuals, priority is really given to criminal prosecution rather than the indefinite and extensive control which is currently available through the use of control orders. In our view, the Government's professed policy of preferring to prosecute as a first resort could be more effectively underpinned by a number of amendments to the control orders framework. (Paragraph 65)
14. We recommend that the PTA 2005 should be amended to provide that, except in urgent cases, the Secretary of State may only make a control order where she is satisfied that there is no reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence. (Paragraph 67)
15. We welcome the improvements to the Home Office's systems for keeping the prospects of prosecution under review. In our view, however, the policy of giving priority to prosecution would be better served by turning this from a matter of mere practice into one of express statutory obligation. We recommend that the PTA 2005 be amended to impose an express duty on the Secretary of State, throughout the period during which a control order has effect, to ensure that the question of whether there is a reasonable prospect of successfully prosecuting the subject of the order for a terrorism-related offence is kept under review at least every 3 months. (Paragraph 72)
16. We therefore recommend that the Secretary of State should be placed under a duty to consult the police prior to her regular review of the prospects of prosecution and to share with the police such information (including intelligence information) as is available to her which is relevant to the prospects of a successful prosecution. (Paragraph 73)
17. We recommend that the control orders legislation be amended to secure greater transparency of decisions that prosecution is not possible, first by imposing a duty on the chief officer of police to provide reasons when he advises the Secretary of State

that there is no realistic prospect of prosecution and, second, by providing that those reasons shall be disclosed to the controlled person to the extent that such disclosure would not be contrary to the public interest. (Paragraph 76)

18. Recruitment as an informer by the Security Service would not in our view be a legitimate exit strategy as this would introduce an illegitimate purpose into the maintenance of the control order. We look forward to receiving the Home Secretary's confirmation that individuals who are the subject of control orders have not and will not be approached by the Security Service for this purpose. (Paragraph 79)
19. We recommend that the control order legislation be amended to impose an express duty on the Secretary of State to keep the decision to impose a control order under review, including by considering whether there continue to be reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity and whether a control order continues to be necessary at all. (Paragraph 84)
20. We do not believe it is sufficient to rely solely on the courts to ensure that the operation of an individual control order is not indefinite or so prolonged that it breaches human rights obligations. We see the force of Lord Carlile's suggestion that there could be a statutory presumption against control orders being extended beyond a maximum duration of two years other than in genuinely exceptional circumstances. On balance, we are in favour of a maximum limit on the duration of a control order, both as an important safeguard of the liberty and mental health of the individuals concerned, and as a discipline on the investigative and enforcement authorities to find material capable of being the basis for a criminal prosecution within a reasonable time. Beyond prohibiting severe controls of indefinite duration, however, human rights law does not provide any clear answer as to what that limit should be. We recommend that Parliament should debate the principle of whether there should be a maximum limit on the duration of a control order, and if so what that limit should be. We will propose an amendment to the Counter-Terrorism Bill to enable such a debate to take place. (Paragraph 87)
21. We express in this Report our major concerns about the adequacy of parliamentary scrutiny of the control order regime that was both promised by the Government at the outset and that is necessary. For the reasons we have explained in this and previous Reports, we continue to have very serious concerns about the human rights compatibility of both the control orders regime itself and its operation in practice. In particular we remain concerned that the regime as it currently stands and as it is currently operated is very likely to result in breaches of both the right to liberty and the right to a fair hearing. (Paragraph 88) We therefore have very serious reservations about the renewal of the control order regime unless the Government is prepared to make the amendments we identify in this Report which are intended to render it human rights compatible. Unless those modifications of the control order regime are made, in our view it is inevitable that the use of control orders will continue to give rise to breaches of individuals' rights both to liberty and due process. (Paragraph 89)

Annex: Extracts from the Committee's Ninth Report 'Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill'

Amendments to the control orders regime to make hearings fair

(1) Express reference to the right to a fair hearing

According to the majority in *MB*, restrictions on disclosure may be justifiable, but not where the effect of such non-disclosure is to deprive a person of their liberty, or to impose other serious restrictions upon them, on the basis of material which is not disclosed to them even in summary form. However, on the face of the statutory framework, including the rules of court, a judge in control order proceedings is precluded from ordering disclosure, even where he considers that disclosure is essential in order to give the controlled person a fair hearing. To avoid that consequence, the House of Lords ruled that the following qualifying words had to be “read in” to the absolute and unqualified words of the statute: “except where to do so would be incompatible with the right of the controlled person to a fair trial.”⁸⁸

Mr. Garnham told us in evidence that he could “see good sense” in using the words “read in” to the statutory framework by the House of Lords and making them explicit in the statute, rather than leaving them in case-law.⁸⁹

We recommend two amendments to the control orders statute (the Prevention of Terrorism Act 2005) to achieve this.

First, we recommend that the relevant provisions in the statutory framework, which expressly require non-disclosure, even where disclosure would be essential for a fair hearing, be amended by the insertion of qualifying words, such as “except where to do so would be incompatible with the right of the controlled person to a fair hearing”.⁹⁰

Second, we recommend that the relevant power for making rules of court in the control orders regime be amended to make explicit reference to the right to a fair hearing in Article 6 ECHR, in the same way as the Bill itself qualifies the power to make rules of court for asset freezing.⁹¹

This could be achieved by inserting a new paragraph⁹² in the Schedule to the PTA 2005: “Nothing in this paragraph, or in rules of court made under it, is to be read as requiring the

⁸⁸ *Secretary of State for the Home Department v MB* [2007] UKHL 46, at para. 72 (Baroness Hale).

⁸⁹ Oral evidence, 17 December 2007, Q32, Ev 8.

⁹⁰ E.g. in s. 3(13) PTA 2005 and paras 4(2)(a) and (3)(d) of the Schedule to the PTA 2005. Similar qualifying words would also have to be inserted into CPR r. 76.29(8), but this obviously is not a matter for the Bill.

⁹¹ Clause 58(6).

⁹² New para. 4(6).

court to act in a manner inconsistent with the right to a fair hearing in Article 6 of the European Convention on Human Rights.”

The effect of this amendment would also be to render *ultra vires* rule 76(2) of the Civil Procedure Rules (“CPR”), which expressly elevates non-disclosure over justice by requiring that in control order cases the overriding objective of the civil procedure rules (requiring courts to deal with cases justly) be read and given effect in a way which is compatible with the duty to ensure that information is not disclosed contrary to the public interest. Baroness Hale expressly disagreed with this provision in her judgment in *MB*,⁹³ as have we, in earlier reports.

(2) Obligation to give reasons for making control order

One of the ways mentioned by Baroness Hale in her judgment in *MB*,⁹⁴ to ensure that the principles of judicial inquiry are complied with to the fullest extent possible, is for the Secretary of State to give as full as possible an explanation of why she considers that the grounds for making a control order⁹⁵ are made out.

In his evidence to us, Neil Garnham QC agreed that such an obligation on the Secretary of State would make control order proceedings fairer; but he anticipated the Security Service’s objection that this would lead to disclosure which is potentially damaging to national security.⁹⁶ We consider that an explicit obligation on the Home Secretary to give as full an explanation as possible of her reasons for making a control order would both provide the controlee with some material which he may be able to contest and would facilitate more open judicial scrutiny of the adequacy of the Home Secretary’s reasons for making an order.

We recommend that an obligation on the Secretary of State to give reasons for the making of a control order be inserted into the statutory framework.⁹⁷

(3) Obligation to provide gist of closed material in some cases

According to the judgments of the majority in *MB*, the concept of fairness imports a core irreducible minimum of procedural protection.⁹⁸ In earlier reports, we have recommended that there should be an obligation on the Secretary of State to provide a statement of the gist of the closed material. Mr Garnham foresaw considerable objection to this proposal from both the Security Services and the Home Office, but did not see that as a reason for not going ahead, and considered it “an entirely sound proposal”.⁹⁹

To give full effect to the judgment in *MB*, we recommend that the statutory framework be amended to provide that rules of court for control order proceedings “must require

⁹³ *Secretary of State for the Home Department v MB* [2007] UKHL 46, at para. 59 (Baroness Hale).

⁹⁴ *Ibid.* at para. 66.

⁹⁵ In s. 2(1) PTA 2005.

⁹⁶ Oral evidence, 17 December 2007, Qs 33, 34.

⁹⁷ E.g. by inserting (as new s. 2(4A) PTA 2005): “A non-derogating control order must contain as full as possible an explanation of why the Secretary of State considers that the grounds in s. 2(1) above are made out.”

⁹⁸ See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 43 (Lord Bingham).

⁹⁹ Oral evidence, 17 December 2007, Q23, Ev 6.

the Secretary of State to provide a summary of any material which fairness requires the controlled person have an opportunity to comment on.”¹⁰⁰

(4) Communication between special advocate and controlee

Mr. Garnham told us in evidence that of all the matters raised by us about the fairness of control order proceedings, communication between the special advocate and the appellant is the “most critical”.¹⁰¹ He described it as “a pretty essential step”, provided some mechanism can be devised for achieving it, because what exists at the moment is “pretty hopeless”, as it requires advance notice to the Secretary of State of the questions the special advocate wants to pose to the controlee.

Mr Garnham suggested that special advocates should have the power to apply *ex parte* (that is, without the Secretary of State being present or represented) to a High Court judge for permission to ask questions of the controlee, which would avoid having to disclose significant parts of their case to the Security Service. This would be a substantial change, because it would mean for the first time special advocates could find a way of putting questions to the person whose interests they are trying to represent without having to disclose those questions to the Secretary of State.¹⁰²

In our view the statutory framework requires amendment, to enable the controlled person to give meaningful instructions about the allegations against him, where it is possible to do so.¹⁰³ We recommend that special advocates be given the power to apply *ex parte* to a High Court judge for permission to ask the controlee questions, without being required to give notice to the Secretary of State.¹⁰⁴

(5) Standard of proof

Mr. Garnham told us that it has long been the view of all of the special advocates that changing the standard of proof to “balance of probabilities” rather than “mere suspicion” is “entirely justified.”¹⁰⁵ He also thought it would make a real practical difference in some cases.¹⁰⁶ The standard of proof was not expressly considered by the House of Lords in *MB*, but the judgments make clear that the standards of procedural protection (which must include the standard of proof) are to be commensurate with the seriousness of the consequences for the controlee. In our view this should be made clear in the legislation itself.

We recommend that the PTA 2005 be amended to provide that, in a hearing to determine whether the Secretary of State’s decision is flawed, the controlled person is entitled to such measure of procedural protection (including, for example, the

¹⁰⁰ In para 4(3)(e) of the Schedule to the PTA 2005. Para 4(3)(f) would also need amending to make it subject to para 4(3)(e) as amended.

¹⁰¹ Oral evidence, 17 December 2007, Q23, Ev 6.

¹⁰² *Ibid.* Q36, Ev 8.

¹⁰³ See e.g. *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 35 (Lord Bingham).

¹⁰⁴ This is also likely to require amendment of CPR r. 76.25(2).

¹⁰⁵ Oral evidence, 17 December 2007, Q23, Ev 7.

¹⁰⁶ *Ibid.* Q24.

appropriate standard of proof) as is commensurate with the gravity of the potential consequences of the order for the controlled person.¹⁰⁷

(6) Power for special advocates to call witnesses

One of the ways suggested by Baroness Hale in *MB* to make the hearing fairer was to permit special advocates to call witnesses to rebut closed material.¹⁰⁸ Although we heard that expert witnesses to assist special advocates are not readily available, because all those who are going to be any good are already working for the Security Service,¹⁰⁹ Mr. Garnham agreed that it might be useful to have it made absolutely clear that special advocates are empowered to call witnesses in control order proceedings.¹¹⁰

We recommend that the PTA 2005 be amended to provide that, where permission is given by the relevant court not to disclose material, special advocates may call witnesses to rebut the closed material.¹¹¹

¹⁰⁷ New s. 3(11A) PTA 2005, using the formulation of Lord Bingham in *MB* at para. 24.

¹⁰⁸ *Secretary of State for the Home Department v MB* [2007] UKHL 46 at para. 66.

¹⁰⁹ Oral evidence, 17 December 2007, Q37.

¹¹⁰ *Ibid.* Q38, Ev 8.

¹¹¹ This would require a new sub-para in para 4(3) of the Schedule to the PTA 2005.

Formal Minutes

Tuesday 19 February 2008

Members present:

Mr Andrew Dismore MP, in the Chair

Lord Bowness	John Austin MP
Lord Dubs	Dr Evan Harris MP
Lord Lester of Herne Hill	Virendra Sharma
The Earl of Onslow	
Baroness Stern	

Draft Report [Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008], proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 89 read and agreed to.

Annex read and agreed to.

Summary read and agreed to.

Several Papers were ordered to be appended to the Report.

Resolved, That the Report be the Tenth Report of the Committee to each House.

Ordered, That the Chairman make the Report to the House of Commons and that Baroness Stern make the Report to the House of Lords.

[Adjourned till Tuesday 26 February at 1.30pm.]

Appendices

Appendix 1: Letter dated 7 February 2008 from the Chairman to the Rt Hon Jacqui Smith MP, Home Secretary, Home Office

Control Orders Annual Renewal

I am writing to you concerning the annual renewal of the control orders legislation, which has been provisionally scheduled to be debated in the Commons on 21st February 2008.

As you will be aware, under s. 14 of the PTA 2005 Lord Carlile is required to carry out his annual review of the operation of the control order provisions “as soon as reasonably practicable in the last quarter of the year of the Act’s operation”, which means as soon as reasonably practicable after 10 December 2007. He is also required to send his report to you as soon as reasonably practicable after it is completed, and you are required to lay a copy of it before Parliament “on receiving it” (s. 14(6) PTA 2005).

In our two previous reports on the annual renewal of the control orders legislation, in both 2006 and 2007, we were extremely critical of the lack of opportunity for meaningful parliamentary scrutiny of the operation of control orders before Parliament was asked to renew the legislation. We pointed out that laying Lord Carlile’s report before Parliament a matter of days before the renewal debate did not provide an opportunity for proper parliamentary scrutiny. Our concerns were echoed in the Lords debate on the renewal order.

This experience led us to recommend, in the context of pre-charge detention, that the statutory reviewer of terrorism legislation should report at least a month before any renewal debate in order to give an opportunity for proper parliamentary scrutiny and so make parliamentary review a more meaningful safeguard (JCHR Report on 28 days, intercept and post-charge questioning, at para. 63). In its response to this report, however, the Government did not respond to this recommendation.

With less than two weeks before the annual renewal debate, and a parliamentary recess intervening, we would be grateful for your answers to the following questions.

1. Have you received Lord Carlile’s annual report on the operation of the control order legislation?

- If not, please indicate when you expect to receive it and confirm that you will lay it before Parliament as soon as you receive it.
- If you have received it, please indicate the precise date on which you received it and confirm that you will immediately lay it before Parliament.

In view of the unavailability of Lord Carlile’s Report and the imminence of the renewal debate in the House of Commons, there is no alternative but to write to ask you some detailed questions in order to ensure that my Committee is as informed as it can be, in the circumstances, to report to Parliament before the debate about renewal.

2. Please provide a breakdown, in relation to each of the 14 individuals currently subject to control orders, showing for how long each individual has been subject to a control order.
3. What independent psychiatric evidence have you sought about the psychological impact on individuals who are indefinitely the subject of a control order?
4. Following the House of Lords judgment in *JJ* have you modified any control orders to increase the curfew to 16 hours and, if so, in how many cases?
5. How many of the 14 control orders in force have been imposed on the ground that you consider it necessary to protect members of the public in another country from a risk of terrorism?
6. Please provide detailed information about prosecutions, successful or otherwise, for breach of a control order since the last annual renewal.
7. How many control orders are in force in respect of individuals who have absconded and cannot be traced?
8. Do you intend to appeal against the quashing of the control order in respect of Cerie Bullivant by the High Court on 29 January 2008?
9. How do you ensure that you comply with your duty to keep the decision to impose a control order under review?

In your most recent quarterly report on control orders you state that the Home Office continues to hold Control Order Review Groups (“CORGs”) to keep the obligations in the order under review and “to facilitate a review of appropriate exit strategies”.

10. We would be grateful if you could provide us with more information about exactly what questions the CORGs consider. In particular:
 - Do the CORGs review whether there continue to be reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, and whether a control order continues to be necessary at all?
 - At meetings of the CORGs does the Home Office inquire into whether there is active investigation of the individual by the law enforcement agencies with a view to prosecution?

11. Please indicate, in general terms and without reference to individual cases, what sorts of “exit strategies” you are considering in relation to individuals who have been the subject of control orders for more than a year.

12. How many individuals who have been made the subject of a control order have subsequently been prosecuted for a terrorism-related offence, other than for breach of the control order?

In view of the imminence of the renewal debate, I would be grateful for your response to these questions by Friday 15 February 2008.

7 February 2008

Appendix 2: Letter dated 18 February 2008 from the Rt Hon Jacqui Smith MP, Home Secretary, Home Office

Thank you for your letter dated 7 February 2008 relating to the annual renewal of the Prevention of Terrorism Act 2005.

Your letter raised a number of questions which, where appropriate, have been answered in Lord Carlile's report. However, in view of the imminence of the debate I am responding to all your queries.

1. Have you received Lord Carlile's annual report on the operation of the control order legislation?

- **If not, please indicate when you expect to receive it and confirm that you will lay it before Parliament as soon as you receive it.**
- **If you have received it, please indicate the precise date on which you received it and confirm that you will immediately lay it before Parliament.**

Lord Carlile's annual report was laid before Parliament today (Monday 18 February). It was received by the Home Office during Recess and published on the first sitting day afterwards.

2. Please provide a breakdown, in relation to each of the 14 individuals currently subject to control orders, showing for how long each individual has been subject to a control order.

There are currently 15 individuals subject to control orders. The dates shown below reflect when these individuals were first served with a control order (since that point their original control order may have been renewed, quashed and/or revoked and replaced with a new one).

- Two individuals were served with control orders in March 2005.
- One individual was served with a control order in September 2005.
- One individual was served with a control order in November 2005.
- One individual was served with a control order in December 2005.
- Two individuals were served with control orders in February 2006.
- One individual was served with a control order in June 2006.
- One individual was served with a control order in July 2006.
- One individual was served with a control order in August 2006.
- One individual was served with control order in September 2006.
- One individual was served with a control order in December 2006.
- One individual was served with a control order in June 2007.
- One individual was served with a control order in July 2007.
- One individual was served with a control order in January 2008.

3. What independent psychiatric evidence have you sought about the psychological impact on individuals who are indefinitely the subject of a control order?

Although it is possible to renew non-derogating control orders 12 months after they were originally made, it is not – nor has it ever been – the case that individuals are indefinitely subject to control orders. The Prevention of Terrorism Act 2005 only allows for control orders to be renewed where ‘necessary, for purposes connected with protecting members of the public from a risk of terrorism’ and for purposes connected with preventing or restricting involvement by that person in terrorism-related activity’ (section 2(6)).

The Home Office does, where appropriate, actively seek information from the individual about the impact of the control order on their physical and mental health. Whilst it would not be appropriate to discuss individual cases, I can confirm that in a number of cases we have commissioned independent medical evidence on a controlled individual, including on their mental health. This evidence, and any provided by the controlled person, is taken into account when assessing the necessity and proportionality of the control order and its obligations.

4. Following the House of Lords judgment in *JJ* have you modified any control orders to increase the curfew to 16 hours and, if so, in how many cases?

I believe that the House of Lords judgment on control orders allows us to impose curfews of up to 16 hours where it is necessary and proportionate to do so. Following the House of Lords judgment, I assessed that it was necessary and proportionate to modify four control orders such that the curfews were increased to 16 hours.

In addition, subsequent to the hand down of the Lords judgment, a control order that includes a 16 hour curfew has been served on another individual.

5. How many of the 14 control orders in force have been imposed on the ground that you consider it necessary to protect members of the public in another country from a risk of terrorism?

It would not be appropriate to comment on the national security cases of the individual cases of the 15 individuals currently subject to control orders.

The Prevention of Terrorism Act 2005 states that “terrorism” has the same meaning as in the Terrorism Act 2000. This definition, in section 1 of the Terrorism Act 2000, extends to actions outside the UK as well as the protection of the Government and public of countries other than the UK. The UK Government works to protect both its citizens and foreign nationals, wherever they may be, from the threat of terrorism. Control orders are an essential part of our toolkit to protect the public from the risk of terrorism.

6. Please provide detailed information about prosecutions, successful or otherwise, for breach of a control order since the last annual renewal.

In June 2007 one individual was charged with contravening his control order obligations. In December 2007, this individual was found not guilty of breach of control order obligations relating to the residency requirement and reporting to the police.

There are three further individuals who since January 2007 have been charged with counts of breaching their control order and whose prosecutions are ongoing.

- In May 2007 one individual was charged with contravening his control order relating to occasions of absences during his curfew.
- In September 2007 one individual was charged with contravening his control order obligations and conspiracy to contravene his control order obligations.
- In September 2007 a further individual was charged with breach of control order obligations including purchasing and keeping a mobile phone, failing to call the monitoring company, and failing to inform the Secretary of State of his interest in a bank account.

7. How many control orders are in force in respect of individuals who have absconded and cannot be traced?

Two individuals currently subject to control orders have absconded.

8. Do you intend to appeal against the quashing of the control order in respect of Cerie Bullivant by the High Court on 29 January 2008?

The Government is disappointed that Mr Justice Collins has indicated that he is not persuaded that Cerie Bullivant's current control order should be maintained and we await his judgement on Mr Bullivant's initial control order. Mr Justice Collins said he was convinced that "subjectively the decision by the Secretary of State to make and maintain the original order was entirely reasonable and honestly held". The Government is considering whether to appeal the High Court's decision.

9. How do you ensure that you comply with your duty to keep the decision to impose a control order under review?

The Home Office continues to hold Control Order Review Groups ("CORGs") on a quarterly basis. The purpose of the group is to keep the obligations, and their impact both individually and cumulatively, under regular review and to facilitate a review of appropriate exit strategies. In addition, ad hoc meetings to review the necessity and proportionality of control orders and their constituent obligations take place when needed.

10. We would be grateful if you could provide us with more information about exactly what questions the CORGs consider. In particular:

The terms of reference of the CORG are as follows:

The purpose of the Group is:

1. *To bring together the departments and agencies involved in making, maintaining and monitoring control orders on a quarterly basis to keep all orders under frequent, formal and audited review.*
2. *To ensure that the control order itself remains necessary as well as ensuring that the obligations in each control order are necessary and proportionate. This includes consideration of whether the obligations as a whole and individually:*

- a. *Are effectively disrupting the terrorism-related behaviours of and risk posed by the individual?*
 - b. *Are still necessary to manage the risk?*
 - c. *Need to be amended or added to in order to address new or emerging risks?*
3. *To monitor the impact of the control order on the individual, including on their mental health and physical well-being, as well as the impact on the individual's family and consider whether the obligations as a whole and/ or individually require modification as a result.*
 4. *To keep the prospect of prosecution under review, including for breach of the order.*
 5. *To consider whether there are other options for managing or reducing the risk posed by individuals subject to control orders.*
- **Do the CORGs review whether there continue to be reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity, and whether a control order continues to be necessary at all?**

Yes. The CORG reviews whether there are still reasonable grounds for suspecting that the individual is or has been involved in terrorism-related activity. The CORG also reviews whether the obligations within the control order, individually and cumulatively, continue to be necessary and proportionate to manage that risk.

- **At meetings of the CORGs does the Home Office inquire into whether there is active investigation of the individual by the law enforcement agencies with a view to prosecution?**

Yes. At each CORG the current prospects of prosecution for terrorism-related offences are discussed and recorded. Consideration of prosecution is given by the relevant law enforcement agencies when appropriate, for example, when new evidence comes to light.

11. Please indicate, in general terms and without reference to individual cases, what sorts of “exit strategies” you are considering in relation to individuals who have been the subject of control orders for more than a year.

Exit strategies are considered for all individuals subject to control orders. This is done on a formal basis quarterly at the CORG.

The formal Government response (published in July 2007) to the second Annual Report of the Independent Reviewer included the main currently available potential exit strategies. These were:

- Prosecution. The prospect of prosecution is kept under review by the police in all cases.
- Deportation. Nine individuals previously subject to control orders have been served with a notice of deportation and their control orders revoked, of whom six have been deported.

- Modify the obligations in a control order: Both control orders and individual obligations are kept under regular review to ensure they remain necessary and proportionate to protect the public from a risk of terrorism; it follows, therefore, that obligations may be reduced or removed as a result of these reviews (conversely, obligations could be increased, if that were necessary).
- Non-renewal or revocation of a control order, if the Secretary of State concludes that a control order is no longer necessary to protect the public from a risk of terrorism. Over the last year, two control orders have not been renewed and one control order has been revoked.

The Government believes it is important to consider whether de-radicalisation and rehabilitation programmes could be deployed to help individuals subject to a control order. Such initiatives would form another potential exit strategy, though consideration would need to be given – as part of the CORG process – to the appropriateness of such action in relation to each individual.

12. How many individuals who have been made the subject of a control order have subsequently been prosecuted for a terrorism-related offence, other than for breach of the control order?

Control orders seek to disrupt terrorist activity. To date, no such prosecutions have been put before the court.

18 February 2008

Reports from the Joint Committee on Human Rights in this Parliament

The following reports have been produced

Session 2007-08

First Report	Government Response to the Committee's Eighteenth Report of Session 2006-07: The Human Rights of Older People in Healthcare	HL Paper 5/HC 72
Second Report	Counter-Terrorism Policy and Human Rights: 42 days	HL Paper 23/HC 156
Third Report	Legislative Scrutiny: 1) Child Maintenance and Other Payments Bill; 2) Other Bills	HL Paper 28/ HC 198
Fourth Report	Government Response to the Committee's Twenty-First Report of Session 2006-07: Human Trafficking: Update	HL Paper 31/ HC 220
Fifth Report	Legislative Scrutiny: Criminal Justice and Immigration Bill	HL Paper 37/HC 269
Sixth Report	The Work of the Committee in 2007 and the State of Human Rights in the UK	HL Paper 38/HC 270
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume I Report and Formal Minutes	HL Paper 40-I/HC 73-I
Seventh Report	A Life Like Any Other? Human Rights of Adults with Learning Disabilities: Volume II Oral and Written Evidence	HL Paper 40-II/HC 73-II
Eighth Report	Legislative Scrutiny: Health and Social Care Bill	HL Paper 46/HC 303
Ninth Report	Counter-Terrorism Policy and Human Rights (Eighth Report): Counter-Terrorism Bill	HL Paper 50/HC 199
Tenth Report	Counter-Terrorism Policy and Human Rights (Ninth report): Annual Renewal of Control Orders Legislation	HL Paper 57/HC 356

Session 2006-07

First Report	The Council of Europe Convention on the Prevention of Terrorism	HL Paper 26/HC 247
Second Report	Legislative Scrutiny: First Progress Report	HL Paper 34/HC 263
Third Report	Legislative Scrutiny: Second Progress Report	HL Paper 39/HC 287
Fourth Report	Legislative Scrutiny: Mental Health Bill	HL Paper 40/HC 288
Fifth Report	Legislative Scrutiny: Third Progress Report	HL Paper 46/HC 303
Sixth Report	Legislative Scrutiny: Sexual Orientation Regulations	HL Paper 58/HC 350
Seventh Report	Deaths in Custody: Further Developments	HL Paper 59/HC 364
Eighth Report	Counter-Terrorism Policy and Human Rights: Draft Prevention of Terrorism Act 2005	HL Paper 60/HC 365
Ninth Report	The Meaning of Public Authority Under the Human	HL Paper 77/HC 410

	Rights Act	
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